

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE STATES OF ALABAMA, ARIZONA, DELAWARE, HAWAII,
ILLINOIS, IOWA, KANSAS, LOUISIANA, MISSOURI, MON-
TANA, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA,
RHODE ISLAND, SOUTH DAKOTA, UTAH AND WEST
VIRGINIA, AND THE COMMONWEALTHS OF KENTUCKY
AND PENNSYLVANIA,

Petitioners,
v.

CHARLES A. BOWSHER, in his official capacity as
Comptroller General of the United States,

and

NICHOLAS F. BRADY, in his official capacity as
Secretary of the Treasury of the United States,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITIONERS' REPLY BRIEF

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OCTOBER TERM, 1991

No. 91-402

THE STATES OF ALABAMA, ARIZONA, DELAWARE, HAWAII,
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PETITIONERS' REPLY BRIEF

The arguments set forth by respondents in their Brief in Opposition are premised upon a fundamental misreading of the statute at issue in this case, 31 U.S.C. §§ 1322(a) and (b).¹ Section 1322(a) provides that

¹ As in the Petition, references to 31 U.S.C. § 1322 or "the Section 1322 fund" refer solely to subsections (a) and (b) of Section 1322.

“claims to the transferred funds shall be paid from the account ‘Unclaimed Moneys of Individuals Whose Whereabouts are Unknown.’” The States contend that, pursuant to their respective unclaimed property statutes, they are entitled to make such “claims to the transferred funds” in their capacity as custodians. This case concerns the interpretation of that phrase and the respect that should be accorded state law in making that interpretation.

The underpinning of respondents’ position is that only “rightful owners” of the property in the Section 1322 fund may make claims upon the fund. Opp. at 7 n.5. Section 1322, however, does not define the terms “claims” or “claimant” and therefore does not support the proposition that only “rightful owners” (as opposed to the States as custodians) may be claimants.

In support of their position, respondents rely exclusively upon provisions in the Treasury Financial Manual (“TFM”). The TFM, however, is merely an internal operating manual that does not carry the force of law. See *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981).² By concluding, without further analysis, that only “rightful owners” may make claims to the Section 1322 fund, respondents ignore the real issues in this case.

1. Thus, with respect to the intergovernmental immunity doctrine, respondents contend that there are no “gaps” in 31 U.S.C. § 1322 because that section “suggests when the custodianship of the Secretary of the Treasury shall end (upon the payment of ‘[s]ubsequent claims to

² Respondents do not distinguish the TFM from the internal handbook at issue in *Schweiker* and cite no authority in support of their position that the TFM should be accorded the force of law. Respondents attempt to bolster the significance of the TFM by arguing that its provisions “track the statutory scheme, 31 U.S.C. 3528.” Opp. at 7 n.5. Section 3528, however, does not even address whether claimants of property held by a federal agency must be the “rightful owners” of that property.

the transferred funds' to claimants)." Opp. at 6. That argument begs the question, which is who are appropriate "claimants" under the statute.

The starting point in answering that question is *United States v. Klein*, 303 U.S. 276 (1938), the only case in which this Court has interpreted 31 U.S.C. § 1322. In that case, the Court held that a State which, pursuant to state law, escheated property held by the Secretary of the Treasury in the Section 1322 fund may claim that property. That decision means that (1) claims may be made by persons or entities other than the individuals originally entitled to the property, and (2) property interests created by state law may determine who may make a claim under Section 1322. The States here contend that, just as the Supreme Court permitted States to make claims under 31 U.S.C. § 1322 as owners of property under state law, so too should States be permitted to make claims as "conservators"³ of the property under state law.

Whether the state custodial taking statutes should be incorporated into the federal statutory scheme depends upon whether they "would frustrate specific objectives of the federal programs." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1717 (1991), quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Respondents are therefore wrong when they state that "[f]or purposes of intergovernmental immunity analysis, it is beside the point whether application of State unclaimed property laws would help or hinder the objective of locating the rightful owners of the unclaimed monies." Opp. at 6. The state unclaimed property statutes do, in fact, further the objectives of 31 U.S.C. § 1322 (see Pet. at 13-15, 22). Such statutes should, therefore, be incorporated into the federal scheme.⁴

³ See *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 547 (1948).

⁴ The essence of the States' theory of this case has been that (1) under the plain language of 31 U.S.C. § 1322, the federal govern-

For the same reasons, respondents' contentions that the unclaimed monies are "federal monies" (Opp. at 5, 7, 8-10) and that the States may not "manage federal property" (*id.* at 5) miss the mark. Under the express terms of 31 U.S.C. § 1322, the interest of the federal government in the Section 1322 fund is subordinate to the interest of claimants to the fund. The Supreme Court has already held that States are not "manag[ing] federal property" when they escheat property in the Section 1322 fund. *Klein*, 303 U.S. at 281-82. Likewise, the States would not be "manag[ing] federal property" by taking custody of property in that fund pursuant to their custodial unclaimed property laws, which have now virtually taken the place of escheat statutes. In both instances, the States would merely be operating in accordance with the federally created limitations on the federal interest in the unclaimed property.

2. Respondents' analysis of the preemption issue also suffers from respondents' mistaken conclusion that only "rightful owners" may make claims on the Section 1322 fund. Thus, respondents argue that whereas "State laws require transfer of unclaimed funds to State custodians[,] Section 1322(a) limits disbursements to claimants (*i.e.*, those with 'claims to the transferred funds')." Opp. at 8. There is no inconsistency between those two propositions. Section 1322 does not preclude claims by States made in a custodial capacity.

Similarly, respondents complain that whereas "State unclaimed property laws purport to extinguish the liability of the federal government * * *[,]" 31 U.S.C. 1322(a) provides that claims to the transferred funds

ment's interest in the Section 1322 fund is subject to superior claims and (2) the States should be permitted to make such claims pursuant to their custodial statutes because those statutes dovetail with 31 U.S.C. § 1322. That the States did not previously use the terms "filled in" or "interstices" (*see* Opp. at 6) is irrelevant. The court below was clearly confronted with the question whether a federal statute should be interpreted so as to accommodate property law relationships created by state statutes.

'shall be paid' by the Secretary of the Treasury." Opp. at 8-9. Only if the term "claims" were defined to mean "claims of the rightful owner"—which it is not—would there be an inconsistency between those two propositions. The States in this action are making claims to the property, which claims must be paid by the Secretary under the terms of the applicable statute. Once States receive the property, the federal government would be relieved of liability and the States would, through implementation of their comprehensive unclaimed property statutes, satisfy claims of the true owners.

Respondents' contention that state unclaimed property laws have different procedures for identifying claimants than federal law (Opp. at 8-9 & n.6) suffers from the same infirmity. The States themselves are claimants to the Section 1322 fund. To the extent any federal procedures exist with respect to state custodial claims, that exhausts the relevant federal procedures. How States locate and validate the claims of true owners of the property is material only in demonstrating that the state statutes further the federal objective of reuniting the missing owners with their property.

CONCLUSION

For the foregoing reasons, and those stated in our petition, a writ of certiorari should be granted.

Respectfully submitted,

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